No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

SERGIO ALBERTO RANGEL-QUINONEZ; ESTHER CHRISTINA MIMENDY-CAMACHO,

Petitioners,

v.

JOHN ASHCROFT,
Attorney General of the United States,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Tenth Circuit improvidently approve the Board of Immigration Appeals' per se rule and narrow application of the term "political opinion" as construed in *INS v. Elias-Zacarias,* 502 U.S. 478 (1992), when it upheld the Board's determination that guerilla targeting of an individual who refused to join the guerilla's group does not (and may not) constitute "political-opinion" form of persecution for asylum purposes unless the individual belongs to a political party or association and enunciates a coherent political thought?

CORPORATE DISCLOSURE/ CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in Rule 29.6 have an interest in the outcome of this case. The representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

There is no parent or publicly held company involved in this case owning 10% or more of any corporation or stock.

Petitioners-Appellants are Sergio Rangel and Esther Camacho.

The following judges were the panelists on the United States Court of Appeals:

Chief Judge Deanell Tacha
Judge Mary Briscoe
Judge Harris Hartz

Petitioners were represented in the Immigration Court and before the Board of Immigration Appeals by

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

CITATION TO OFFICIAL AND OFFICIAL REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Tenth Circuit appears at App. 1 to the Petition and is officially unpublished, but is also found at 2004 WL 1167382.

The Opinion and Order of the Board of Immigration Appeals ("the Board" or "BIA") appears at App. 10 and is unpublished.

The opinion and order of the Immigration Judge ("IJ") appears at App. 12 and is unpublished.

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the order and judgment entered on May 26, 2004, in the United States Court of Appeals for the Tenth Circuit, by a Petition for Writ of Certiorari pursuant to this Court's jurisdiction as conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

There are no Constitutional Provisions involved in this case. The following relevant statutory provisions are attached in App. 25-29:

> 8 U.S.C. § 1101(a)(42); 8 U.S.C. § 1158; 8 U.S.C. § 1231(b)(3).

STATEMENT OF THE CASE

Petitioners, Sergio Rangel Quinonez and Esther Cristina Camacho Mimendy ("the Rangels"), husband and wife, are natives and citizens of Colombia who were admitted to the United States by the former Immigration & Naturalization Service ("INS") as non-immigrants on June 20, 1999, and authorized to stay until September 19, 1999.[1] The Rangels, however, overstayed beyond the time allowed by DHS. App. 2, at 2. The Rangels have three United States citizen children, Mariana, 6, Sergio, 2, and Valeria, 5 months old. The Rangels are gainfully employed and enjoy tremendous community support in the Salt Lake City, area, where they reside. *See* Oral Decision of the IJ, App. 15.

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[1] As of March 1, 2003, the INS was abolished and its functions transferred to the newly created Department of Homeland Security ("DHS"). *See Falcon-Carriche v. Ashcroft*, 350 F.3d 845, 848 n.1 (9th Cir. 2003); 6 U.S.C. § 542.

On or about December 12, 1999, Mr. Rangel filed an asylum application with DHS. Mrs. Rangel's asylum application is derivative of her husband's. The basis for the asylum application stems from Mr. Rangel's past political persecution in his native Colombia, which he believes gives rise to fear of future persecution in that country. App. 2. More specifically, Mr. Rangel testified credibly be fore the IJ that, in 1999, while working as a personnel manager at his father's automobile dealership in his native town of Bucaramanga, Colombia, a man who identified himself as a member of a guerilla group demanded that Mr. Rangel employ "one of their people." R.110; App. 4, at 4-5; *see also* IJ Decision, App. 15.[2]

In Colombia, it is very common for guerillas to place people as employees in a business and then use those "employees" to lure co-workers to the guerillas' political beliefs. R.111-112; App. 4; App. 16. Mr. Rangel refused these overtures, telling the guerilla that his political views were not in line with those of the guerillas, and asked him therefore to leave. Mr. Rangel reported the incident to the police. R.111; App. 16.

Thereafter, on March 9, 1999, several men entered the car dealership, armed with guns and grenades. They tied up several of the employees and attempted to force Mr. Rangel into a truck, hitting him

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[2] The citation "R." is to the administrative record submitted to the court of appeals but not appended to this petition. In addition, the Rangels note that the IJ or BIA did not make an adverse credibility finding; accordingly, credibility was presumed in the court of appeals. *See* App. 1c, at 8. *See also Ruano v. Ashcroft*, 301 F.3d 1155, 1159 (9th Cir. 2002); *Artuga-Turco v. INS*, 829 F.2d 720, 723 (9th Cir. 1987).

on the head, which resulted in an injury. Mr. Rangel was, however, able to escape from the men and thus the abduction failed. Mr. Rangel later attributed to the attempted abduction to his earlier refusal to accede to the demand that he employ a member of the guerilla. Further, a contemporaneous newspaper article buttressed Mr. Rangel's rendition of events, and DHS also conceded before the IJ that Mr. Rangel was a victim of an attempted kidnapping on March 19, 1999. R.110; App. 4; App. 16, 18.

Shortly after the failed abduction, Mr. Rangel hid for one week at his father's home in the hills above Bucaramanga. This was a place frequented by a number of Colombia's top political figures, thus reassuring Mr. Rangel that he would be safe there. App. 4; App. 18. Subsequently, Mr. Rangel left Colombia with his wife and daughter for Miami, Florida. Believing that his situation would improve if he hired security guards, Mr. Rangel returned to Colombia a week and half later. R.112-114; *see also* App. 18. However, threatening follow-up calls persisted from the guerillas, which he reported to the police. Accordingly, on June 20, 1999, Mr. Rangel returned to the United States. *See* App. 5.

On August 14, 2000, after a hearing, the IJ denied Mr. Rangel's asylum claim on the ground that Mr. Rangel had failed to show neither a subjective nor an objective fear of persecution on the account of his political opinion in Colombia. *See* App. 22-23; *see also* App. 5. The IJ reasoned that the fact that Mr. Rangel returned to Colombia only 10 days after his first entry into the United States, and the fact that his parents and

brothers are living safely in Colombia indicate a lack of subjective fear of persecution. *See* App. 22-23; App. 5.

With respect to the objective elements of the asylum claim, the IJ found that Mr. Rangel failed to connect the harm he suffered as a result of the attempted kidnapping to any of the statutory protected grounds. *See* App. 21; App. 5. The IJ also denied Mr. Rangel's application for withholding of removal because, having failed to meet the lower burden of proof associated with asylum, *a fortiori*, he could not meet the necessarily higher burden of proof necessary for withholding of removal. R-74-76; App. 23.

On August 24, 2000, Mr. Rangel appealed the IJ's decision to the Board of Immigration Appeals, which summarily affirmed without an opinion on March 6, 2003. *See* App. 10.[3] Mr. Rangel then filed a petition for review in the United States Court of Appeals for the Tenth Circuit on April 1, 2003. *See* App. 1. For Rule 14(g)(ii) purposes, the Tenth Circuit had appellate jurisdiction pursuant to 8 U.S.C. § 1252(a) based on an appeal from a final order of removal from the BIA.

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[3] *See* 8 C.F.R. § 3.1(7) (2004) (authorizing streamlined procedure by the BIA, including affirmance without an opinion). *See also Yuk v. Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004); *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (finding the regulation constitutional).

On May 26, 2004, the Tenth Circuit affirmed the BIA's denial of asylum and withholding of removal, on the ground that the record supports the IJ's holding that guerilla targeting of an individual does not itself amount to political persecution for the purposes of an asylum claim unless the individual enunciates a coherent political thought.[4] *See Rangel v. Ashcroft*, Case No. 03-9541, 2004 WL 1167383 (10th Cir., May 26, 2004), *Slip. Op.* at 8.

ARGUMENT

I. **The Decision of the United States Court of Appeals for the Tenth Circuit Sanctioning the Board's Per Se Rule that Guerilla Targeting of an Individual Who Refused to Join the Guerilla's Group May Not Constitute "Political-Opinion" Form of Persecution For Asylum Purposes Unless the Individual Belongs to a Political Party or Organization and Expresses a Coherent Political Thought Constitutes an Improper Application of *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), is Erroneous, Departs from Normal Course of Judicial Proceedings, and Conflicts with the Decision of Other Circuits.**

In the seminal case of *INS v. Elias-Zacarias*, 502 U.S. 478, 482-484, 112 S.Ct. 812, 816-17, 117 L.Ed.2d 38 (1992), similarly involving whether the alien petitioner

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[4] Where the BIA summarily affirms the IJ, especially without an opinion, the Court of Appeals "reviews the IJ's analysis as if it were the BIA's." *Tsevegmid v. Ashcroft*, 366 F.3d 1231, 1235 (10th Cir. 2003).

had demonstrated persecution on account of political opinion, this Court held:

> As for the Court of Appeals' conclusion that the guerillas' "motive in carrying out the kidnapping is political": It apparently meant by this that the guerrillas seek to fill their ranks in order to carry on their war against the government and pursue their political goals. *See* 921 F.2d at 850 (citing *Arteaga v. INS*, 836 F.2d 1227, 1232,n.8 (CA9 1998); 921 F.2d at 852. But that does not render the forced recruitment "persecution on the account of . . . political opinion." In construing statutes, "we must start, of course, with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962); *see Cardoza-Fonseca, supra*, 480 U.S., at 431, 107 S.Ct. at 1213; *INS v. Phinpathya*, 464 U.S. 183, 189, 104 S.Ct. 584, 589, 78 L.Ed.2d 401 (1984). The ordinary meaning of the phrased "persecution on the account . . . political opinion" in δ 101(a)(42) is persecution on account of the victim's political opinion, not the persecutor's. . . . Thus, the mere existence of a generalized "political" motive underlying the guerillas' forced recruitment is inadequate to establish (and, indeed, goes so far as to refute) the

proposition that Elias-Zacarias fears persecution on account of political opinion, as § 101(a)(42) requires.

Elias-Zacarias appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so, since we do not agree with the dissent that only a "narrow, grudging construction of the concept of 'political opinion,' post, at 818, would distinguish it from such quite difference concepts of indifference, indecisiveness, and risk averseness. But we need not decide whether the evidence compels the conclusion that Elias-Zacarias held a political opinion. Even if it does, Elis-Zacarias still has to establish that he has a well-founded fear of persecution that the guerillas will persecute him because of that political opinion, rather than because of his refusal to fight with them. He has not done so with the degree of clarity necessary to permit a reversal of a BIA finding to the contrary; indeed, he has not done so at all.

Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutor's motives. We do not require that. But since the statute makes motive critical, he must provide some evidence of it, direct or

> circumstantial. And if he seeks to obtain judicial reversal of the BIA's determination, he must show that the evidence he presented was so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution.

Elias-Zacarias, 502 U.S. at 482-484, 112 S.Ct. at 816-17, 117 L.Ed.2d at 38.

The foregoing clearly illustrates that this Court, unlike the Tenth Circuit, did not employ a per se rule (or narrowly construe "political opinion") such that guerilla targeting of an individual who refused to join the guerilla's group may not constitute "political-opinion" form of persecution for asylum purposes. Rather, this Court simply required that the asylum applicant demonstrate, in addition to past persecution or fear of persecution, a connection between the persecution and the applicant's political opinion the persecutor sought to change or influence. *See Elias-Zacarias*, 502 U.S. at 481-482; *see also Lopez v. Ashcroft*, 366 F.3d 799, 804 (9th Cir. 2004) (persecution alone is insufficient to qualify for asylum; "[Petitioner] also had to show that the persecution occurred because of a protected ground.").

This Court grants petitions for certiorari if the court of appeals has rendered a decision that has so far departed from the norm as to call for this Court's supervisory authority. *See Nguyen v. United States*, 538 U.S. 69, 71, 123 S.Ct. 2130, 156 L.Ed. 2d 64 (2003). The Rangels submit that, in the instant case, for the reasons following, this Court should grant the petition for

certiorari on the sole issue raised for two distinct reasons. First, within its ruling, the United States Court of Appeals for the Tenth Circuit disregarded this Court's decision which did not employ a per se rule as utilized by the court of appeals, or narrowly restrict "political opinion" to a demonstrable, coherent political thought. Second, the court of appeals' decision encourages the BIA (and the IJs) to employ a per se rule within the Tenth Circuit, contrary to this Court's and other Circuits' decisions, and thus frustrating Congress' and the agencies' quest for a national uniform immigration law.

A. The Court of Appeals' Decision Disregarded this Court's Decision in *Elias-Zacarias*

1. Statutory Scheme and Standards of Eligibility for Asylum & Withholding of Removal

An asylum applicant must first demonstrate that he is a "refugee" within the meaning of INA Section 101(a)(42)(A), 8 U.S.C. § 1101(a)(42). *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 423, 107 S.Ct. 1207, 1209, 1221, 94 L.Ed.2d 434 (1987); *Wiransane v. Ashcroft*, 366 F.3d 889, 891 (10th Cir. 2004); *Dulane v. INS*, 46 F.3d 988, 996-99 (10th Cir. 1995). That definition includes the requirement that an alien demonstrate that he is unwilling or unable to return to his country because of persecution or a "well-founded fear" of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INA §

208, 8 U.S.C. § 1158, 8 C.F.R. § 208.13(b)(2); *Cardoza-Fonseca,* 480 U.S. at 431, 107 S.Ct. at 1213, 94 L.Ed.2d 434 (fear of persecution "can be well-founded even when there is less than 50% chance of the occurrence taking place."); *Woldemeskel v. INS,* 257 F.3d 1185, 1189-1190 (10th Cir. 2001).

In *Cardoza-Fonseca,* this Court held that the "clear probability" standard employed for withholding of deportation under section 243(h) [now § 241(b)(3)] of the Act is significantly different from the "well-founded fear" of persecution standard used for asylum under section 208 of the Act, and that the well-founded fear standard requires a lesser degree of proof than the clear probability standard. *See id.,* 480 U.S. at 431, 107 S.Ct. at 1213, 94 L.Ed. 2d at 434; *Montoya-Ulloa v. INS,* 79 F.3d 930 (9th Cir. 1996). Accordingly, once an applicant satisfies "the higher burden of proof required for withholding of deportation, it follows that she has satisfied the lesser 'well-founded' fear standard of proof required for asylum." *Matter of Soleimani,* 20 I. & N. Dec. 99 (BIA 1989). *Accord Ramirez-Rivas v. INS,* 899 F.2d 864, 866 (9th Cir. 1990). Conversely, if the applicant fails to meet the lesser well-founded standard, she *a fortiori* cannot meet the more rigorous withholding of removal standard. *See Woldemeskel,* 257 F.3d at 1189-92; *Pedro-Mateo v. INS,* 224 F.3d 1147, 1150 (9th Cir. 2000); *Alvarez-Flores v. INS,* 909 F.2d 1, 4 (1st Cir. 1990).[4]

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[4] As a result of different standards of persuasion, the evidence presented for asylum and withholding may differ, with the latter requiring more objective and corroborative evidence. *Compare Chavarria v. US Dept of Justice,* 722 F.2d 666 (11th Cir. 1984) *with Bolanos-Hernandez v. INS,* 767 F.2d 1277 (9th Cir. 1984).

The "well-founded fear" standard, of course, includes both an objective and subjective component. *Woldemeskel*, 257 F.3d at 1190. The objective component requires a showing by credible, direct, and specific evidence in the record of facts that would support a reasonable fear that the alien faces persecution.[5] The alien must also establish that he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment or persecution of some sort. *See Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), *as limited by Pitcherskaia*, 118 F.3d at 648. The threat or infliction of physical harm is the classic form of persecution. *See Montoya-Ulloa*, 79 F.3d at 930; *see also* INS Supplementary Refugee/Asylum Adjudications Guidelines, *reprinted in* 67 *Interpreter Releases* 101-101 (Jan. 22, 1990) (persecution may be periodic and arrest need not be imminent at the time applicants leaves country). However, for the harm or suffering to be considered persecution it must have been inflicted either by the government or by persons the government is willing or unable to control. *See Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996).

An alien may also establish statutory eligibility for asylum by demonstrating that he was persecuted in the past on account of political opinion or any of the other grounds enumerated in the Act for which asylum

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5 *See Cardoza-Fonseca*, 480 U.S. at 431, 107 S.Ct. 1213, 94 L.Ed.2d 434; *Pitcherskaia v. INS*, 118 F.3d 641, 648 (9th Cir. 1997); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1002 (9th Cir. 1988); *Matter of Barrera*, 19 I. & N. Dec. 837, 845 (BIA 1989).

may be granted.[6] Where past persecution is established by the alien, the Service will ordinarily have to present, as a factor against the favorable exercise of discretion, evidence that there is little likelihood of present persecution, or the agency may take administrative notice of changed circumstances in appropriate cases, such as where the government from which the threat of persecution arises has been removed from power.[7] *See Woldemeskel*, 257 F.3d at 1190-91. Second, once the asylum applicant shows past persecution or credible fear of future persecution, then the Attorney General must exercise or decline to exercise discretion in granting the application for asylum. *See Woldemeskel*, 257 F.3d at 1190.

On the other hand, to qualify for withholding of removal,[8] an alien must show that his life or freedom would be threatened in the country of removal on account of his race, religion, nationality, membership

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6 *See Kossov v. INS*, 132 F.3d 405, 409 (7th Cir. 1998); *Chang v. INS*, 119 F.3d 1055, 1062 n.4 (3d Cir. 1997); *Matter of Chen*, 20 I. & N. Dec. 16, Interim Dec. #3104 (BIA 1989).

7 *See* 8 C.F.R. § 208.13(b)(1)(I); *Vallecilo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1997)(Government does not overcome presumption by simply asking for administrative notice of changed conditions in Nicaragua); *Osorio v. INS*, 99 F.3d 928, 932 99th Cir. 1996);*Matter of C-Y-Z-*, 21 I. & N. Dec. 915, Int. Dec. # 3319 (BIA 1997); *Matter of H-*, 21 I. & N. Dec. 337, Int. Dec. #3276, at 19 n.7 (BI A 1996).

8 Withholding of removal, unlike asylum, provides for absolute prohibition of removal of a person to a country in which his life would be threatened. *See Cardoza-Fonseca*, 480 U.S. at 429, n.6., 107 S.Ct. at 1212, n.6., 94 L.Ed.2d at 434.

in a particular social group, or political opinion. *See* INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A). To make this showing, the alien must establish a "clear probability" of persecution on account of one of these enumerated grounds. *See INS v. Stevic*, 467 U.S. 407, 413, 104 S.Ct. 2489, 2493, 81 L.Ed.2d 321 (1984); *Matter of Medina*, 19 I. & N. Dec. 734 (BIA 1988).

This clear probability standard requires a showing that it is more likely than not an alien would be subject to persecution and thus imposes an absolute bar on removal by the Attorney General for an applicant who has met his burden.[9] *Cardoza-Fonseca*, 480 U.S. at 429, 107 S.Ct. at 1212, 94 L.Ed.2d at 434. If the alien is determined to have suffered such persecution in the past, it shall be presumed that his life or freedom would be threatened on return to that same country unless a preponderance of the evidence establishes that conditions in that country have changed to such an extent that it is no longer more likely than not that the alien would be persecuted there. *See* 8 C.F.R § 208.16(b)(2); *Vongsadky v. INS*, 171 F.3d 1203, 1205-07 (9th Cir. 1999).

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9 "Persecution means the infliction of suffering or harm upon those who differ . . . in ways regarded as offensive," *Kapcia v. INS*, 944 F.2d 702, 706 (10th Cir. 1991), and "may be inflicted either by the government or by persons or organizations that the government is unable or willing to control." *Id.* (*quoting McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981) (*core holding superseded by the statute). See generally Woldemeskel*, 257 F.3d at 1190 (defining persecution).

Withholding of removal, like asylum, offers relief from removal based on the likelihood of persecution in the alien's home country. While asylum requires a lesser showing of persecution (lower burden of proof) than withholding, it also carries with it the entitlement to become a permanent resident alien in the United States. On the other hand, withholding of removal does not offer automatic right to permanent residency, for the alien may still be removed to a neutral country in which s/he would not be subjected to persecution. The better benefit obtained under withholding, therefore, is the absolute bar on the Attorney General to remove an alien to a particular country where he will be persecuted. *See Cardoza-Fonseca,* 480 U.S. at 428, n.6; 107 S.Ct. at 1212, n.6., 94 L.Ed.2d at 434.

The withholding of removal statute, INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A), provides in pertinent parts that the Attorney General "may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in such country on the account of race, religion, nationality, membership in a particular social group or political opinion.."[10] An alien who meets this

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10 INA § 241(b), 8 U.S.C. § 1231(b) provides:

(3) **Restriction on removal to a country where the alien's life or freedom would be threatened**

(A) **In general**

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General

determines that such alien's life or freedom would be threatened in that because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) **Exception**

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that–

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgement of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States before the alien arrived in the Unites States, or

(D) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

standard and does not fall under a statutory exception, may not be removed by the Attorney General. *See Cardoza-Fonseca*, 480 U.S. at 429, 107 S.Ct. at 1212, 94 L.Ed.2d at 434; *Choem v. INS*, 129 F.3d 29 (1st Cir. 1997); 8 C.F.R. § 208.16. Accordingly, even aliens who have been convicted of the most serious crimes – "aggravated felonies" – remain eligible for withholding of removal, provided they served less than five years imprisonment. *See,e.g., Hernandez-Barrera v. Ashcroft*, 373 F.3d 9, 18 (1st Cir. 2004); *Bankhole v. INS*, 2002 WL 32002678 (D. Conn. 2002).

2. The Court of Appeals Decision Departed from Well-Established Statutory Standards and Interpretive Case Law.

In applying the foregoing statutory standards and case-law interpreting them, the Court of Appeals for the Tenth Circuit impermissibly approved or sanctioned the IJ's (or BIA's) determination that guerilla targeting of an individual who refused to join

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For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the attorney general from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

the guerilla's group may not constitute "political-opinion" form of persecution for asylum purposes, unless the individual also shows that he belongs to a political party or expresses a coherent political thought. More specifically, the IJ found that Mr. Rangel Quinonez had failed to show that the attempted abduction was related to his political opinion because Mr. Rangel "did not have a meaningful political opinion which anyone would be interested in changing," and failed to demonstrate his membership in a political party. R.74-75; App. 21. The Court of Appeals agreed with the IJ, reasoning:

> Although Mr. Rangel told the first alleged guerilla that he did not share the guerilla's views, this expression of opinion (probably held by most of his compatriots) was not necessarily the reason for his persecution. *Cf. Elias-Zacarias*, 502 U.S. at 438 ("[Petitioner] appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so. . . . "). After all, Mr. Rangel Quinonez had not distinguished himself from the general populace by participating in any political activity. It was not unreasonable for the IJ to find that the guerrillas' interest in him was not his rather vague political views but something else, such as his wealth or his position in the car dealership. Hence, we affirm the IJ's adverse asylum determination on the ground that Petitioners failed to show that any persecution of Mr. Rangel Quinonez was based on his political opinions.

Rangel v. Ashcroft, No. 03-9541, 2004 WL 1167383 (10th Cir., May 26, 2004), *Slip. Op.* at 8-9; App. 9.

The Tenth Circuit's decision is contrary to this Court's holding in *Elias-Zacarias*. Unlike the court of appeals' per se rule that guerilla targeting of an individual for political reasons does not itself constitute persecution unless the applicant belongs to a political organization or expresses a Plato-like political thought, this Court only held in *Elias-Zacarias* that the asylum applicant demonstrate, in addition to persecution, a connection between the persecution and the applicant's political opinion which the persecutor sought to change or influence. *See id.*, 502 U.S. at 482-483, 112 S.Ct. at 816, 117 L.Ed.2d at 38. This Court certainly did not hold that demonstrable political targeting by guerillas of an individual may not constitute political persecution for asylum purposes unless the individual also shows that he belongs to a political party or is a versatile political thinker.

The records below show that Mr. Rangel suffered past political persecution in Colombia. Both DHS and the IJ agreed that Mr. Rangel was beaten and almost abducted at gun-point by guerrillas who demanded that he employ one of them. He suffered this harm as a result of his refusal to accede to the guerrilla's request. See App. 17. Clearly, evidence concerning the treatment by a guerilla group of a person or his family is highly probative of threat against the asylum seeker. Indeed, courts have found evidence of this nature as constituting past

persecution.[11] *See,e.g., Lopez v. Ashcroft*, 366 F.3d at 804 (refusal to cooperate with guerillas against Guatemalan government equals persecution;) *Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (same); *Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988) (mere threat of kidnapping equal persecution); *Aguilera-Cota v. INS*, 914 F.2d 1375 (9th Cir. 1990) (threatening anonymous note plus visit from stranger equal persecution); *see also Mgoian v. INS*, 184 F.3d 1029, 1035-36 (9th Cir. 1999); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Gebremichael v. INS*, 10 F.3d 28 (1st Cir. 1993).

Further, it is axiomatic that "political opinion" includes activities broader than electoral process, definitely encompassing active anti-guerilla actions or defiance as engaged by Mr. Rangel, and not simply a rendition of a thoughtful political theory as required here by the Board and the Court of Appeals *See Elias-Zacarias*, 502 U.S. at 478; *Lopez*, 366 F.3d at 804; *Osorio v. INS*, 18 F.3d 1017, 1029-31 (2d Cir. 1994). *But see also, e.g., Velasquez-Valencia v. INS*, 244 F.3d 48, 50 (1st Cir. 2001) (neutrality could itself be a persecutable opinion). And the record in this case supports a finding that Mr. Rangel was kidnapped and almost abducted at gun-point by the guerillas because he rebuffed their overtures on political grounds. Therefore, DHS did not rebut the presumption of past persecution in Colombia or that country conditions have changed.

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11 The converse, however, is not true. The fact that an applicant's family members are not persecuted is not relevant to the asylee's claim. *Harttoni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994).

Moreover, the Board and the Courts have recognized that there are mixed motive cases in which it is almost impossible to discern the exact reason or motive for the persecution. *See,e.g., Pitcherskaia*, 118 F.3d at 647; *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995); *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996). In such a case, it is sufficient that the applicant demonstrate that the persecution was motivated in part by an actual or imputed political opinion. *See,e.g., Tarubac v. INS*, 182 F.3d 1114, 1118-1119 (9th Cir. 1999) (reversing BIA where it treated the presence of a non-political motive as evidence of absence of a political motive).

In this case, Mr. Rangel provided detail and credible testimony that the guerillas kidnapped and almost successfully abducted him because of his stance that he did not share their political views and refused to employ one of the guerillas. He also testified to repeated threatening and harassing telephone calls from the guerillas. Without any deference to mixed-motive cases such as *Matter of S-P-*, the IJ and the court of appeals concluded that the guerillas must have been motivated by economic gains. *See* App. 8. As the Ninth Circuit held in *Pitcherskaia*, 118 F.3d at 647, the Board and the Court of Appeals "misconstrued the motive requirement. *Elias-Zacarias* does not require that an alien provide evidence that the persecutor's motive was to inflict harm." Therefore, having suffered this kind of constant physical harassment and attempted forced abduction, Mr. Rangel has shown politically-based past persecution and a genuine, well-founded fear of persecution if returned to Colombia.

In summary, the record shows that Mr. Rangel has demonstrated that he met the well-founded fear of persecution standard and should have been granted the relief of asylum by the Court of Appeals. *See* 8 C.F.R. § 208.13(b)(1). Therefore, the Tenth Circuit's decision holding that he failed to establish past persecution and a well-founded fear of persecution is not supported by substantial evidence, and no reasonable fact-finder could fail to see that he had shown the requisite fear of persecution. *See Elias-Zacarias*, 502 U.S. at 484, 112 S.Ct. at 817, 117 L.Ed.2d at 38.

Similarly, upon finding that Mr. Rangel was not statutorily barred from seeking withholding of removal, the Board and the court of appeals should have applied the standard set forth in 8 C.F.R. § 208.16 in determining eligibility for withholding.

As demonstrated above, Mr. Rangel also met the higher burden of proving persecution under the clear probability standard for his past politically-motivated persecution in Colombia. Where, as here, past persecution has been shown by the applicant, it shall be presumed that future persecution is imminent. *Gonzalez v. INS*, 82 F.3d 903, 910 (9th Cir. 1996); 8 C.F.R. § 208.13(b)(1). Accordingly, the Tenth Circuit's decision to the contrary is not supported by substantial evidence and should be reversed by this Court through this certiorari petition. *See Elias-Zacarias*, 502 U.S. at 484, 112 S.Ct. at 817, 117 L.Ed.2d at 38.

B. The Court of Appeal's Decision Encourages the Agencies to Employ a Per Se Rule and is Contrary to this Court's and other Circuits' Decisions

The Tenth Circuit's decision impermissibly sanctions the administrative agencies' employment of a per se rule contrary to this Court's and other appellate court decisions on a similar issue. *See,e.g., United States v. Drayton*, 536 U.S. 194, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002); *Rock v. Arkansas*, 483 U.S. 44, 68, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) (frowning against application of per se rule). For example, the United States Court of Appeals for the Ninth Circuit has held that a refusal to cooperate with guerillas may, under certain circumstances, constitute a political opinion for purposes of asylum. *See Lopez*, 366 F.3d at 804; *Rios*, 287 F.3d at 900. The Ninth Circuit has held that while an asylum applicant "must provide some direct or circumstantial evidence that they were persecuted on account of political opinion, . . .we have held persecution to be on account of political opinion where there appears to be no other logical reason for the persecution at issue." *Rios*, 287 F.3d at 900 (citing *Ernesto Navas v. INS*, 217 F.3d 646, 657 (9th Cir. 2000)).

Similarly, the United States Court of Appeals for the First Circuit has recognized that neutrality may itself be persecutable. *See Velasquez-Valencia*, 244 F.3d at 50. Therefore, the Tenth Circuit's decision requiring that Mr. Rangel couple his fear of persecution with a certain coherent theoretical political ideology, or for him to do so in consonance with a political association,

is erroneous and conflicts with *Elias-Zacarias* and other Circuit decisions.

Further, the foregoing clearly illustrate that other Circuits have not employed the kind of per se rule utilized in the instant case by the Tenth Circuit. Should this Court not reverse the Tenth Circuit and resolve the conflict, the administrative agencies will continue to frustrate Congressional intent that the asylum laws be applied consistently and uniformly Nationwide. *See,e.g., INS v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984) (granting certiorari to resolve conflict with Circuits).

Moreover, the Board (and the IJs) cannot achieve their oft-stated goal of a uniform national immigration law[12] when the Circuits are hopelessly divided in their plenary review of Board decisions. *See Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994). And, without a doubt, "National uniformity in the immigration and naturalization laws is paramount; rarely is the vision of a unitary nation so pronounced as the laws that determine who may cross our national borders and who may become a citizen." *Rosendo-Ramirez*, 32 F.3d at 1091; *see also Alfaro-Orellana v. Ilchert*, 720 F.Supp. 792, 797 (N.D. Cal. 1989) (lamenting checkerboard pattern of adjudicating asylum laws).

Therefore, it is respectfully submitted that the Tenth Circuit was in error when it sanctioned the BIA's narrow construction of the term "political opinion" as utilized in § 1101(a)(42) to apply only to members of

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12 *See Matter of Yanez-Garcia*, 23 I. & N. Dec. 390, 393 (BIA 2002); *Matter of Cerna*, 20 I. & N. Dec. 399 (BIA 1991).

political parties or active enunciation of a coherent political thought. Because the issue of what is "political opinion" has been so narrowly construed by the Tenth Circuit, in contrast to this Court and other Circuits, the issue raised by this Petition is appropriate for review by this Court.

CONCLUSION

For the foregoing reasons, the Petitioners submit that this Court should grant review in this case to reverse the holding of the United States Court of Appeals for the Tenth Circuit. The Petitioner would also ask, as an alternative relief, that this Court remand this case to the court of appeals for further proceedings consistent with the Court's decision.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SERGIO ALBERTO RANGEL QUINONEZ
and ESTHER CRISTINA CAMACHO MIMENDY,

Petitioners,

JOHN ASHCROFT,

Respondent.

No. 03-9541
(Petition for Review)
(Nos. A77-868-231/232)

[ENTERED: MAY 26, 2004]

ORDER AND JUDGMENT*

Before **TACHA**, Chief Judge, **BRISCOE**, and **HARTZ**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Petitioners Sergio Alberto Rangel Quinonez and Esther Cristina Camacho Mimendy, appeal the March 6, 2003, decision by the Board of Immigration Appeals (BIA), affirming the order of an immigration judge (IJ) ordering their removal from the United States. We exercise jurisdiction under 8 U.S.C. § 1252(a), see *Tsevegmid v. Ashcroft*, 336 F.3d 1231, 1235 (10th Cir. 2003), and affirm.

I. BACKGROUND

Petitioners are natives and citizens of Colombia who were admitted to the United States as nonimmigrants on June 20, 1999. They were authorized to remain in the country until September 19, 1999, but remained without authorization beyond that date. At a hearing before the IJ on April 25, 2000, Petitioners conceded removability, but applied for asylum and restriction on removal under §§ 208 & 241(b)(3) of the Immigration and Nationality Act (INA), and withholding of removal under the Convention against Torture. Ms. Camacho Mimendy is married to Mr. Rangel Quinonez, and her claims are derivative of his. The IJ rejected Petitioners' applications for asylum, restriction on removal, and withholding of removal, and ordered their removal from the United States. The BIA affirmed without opinion. On appeal Petitioners challenge the denial of their claims for asylum and restriction on removal They do not contest the rejection of their claim under the Convention against Torture.

A. Applicable Law

Asylum and restriction on removal are the two available means of relief under the INA to an alien who fears persecution if returned from the United States to a particular country. *Wiransane v. Ashcroft*, No. 02-9555, 2004 U.S. App. LEXIS 8259 at *2 (10th Cir., Apr. 27, 2004). "A grant of asylum permits the alien to remain in this country; a restriction on removal forbids removal of the alien to the country where persecution may occur." *Id.*

In order to be eligible for asylum, an alien must first establish his status as a refugee. 8 U.S.C. § 1158(b)(1). To do so, he must show that he "is unable or unwilling to return to, and is unable or unwilling to avail himself . . . of the protection of, [his country of origin] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). Aliens who, like Petitioners, base their asylum claims upon a well-founded fear of future persecution "must show both a genuine, subjective fear of persecution, and an objective basis by credible, direct, and specific evidence in the record, of facts that would support a reasonable fear [of] . . . persecution." *Wiransane*, 2004 U.S. App. LEXIS 8259 at *5 (internal quotation marks omitted).

In order to obtain a restriction on removal, Mr. Rangel Quinonez must show that his "life or freedom would be threatened in [Colombia] because of [his] race, religion, nationality, membership in a particular social group, or political opinion." INA § 241(b)(3)(A), 8

U.S.C. § 1231(b)(3)(A). "The Attorney General may not remove an alien if the alien is able to establish a clear probability of persecution in the country to which he would be returned." *Wiransane*, 2004 U.S. App. LEXIS 8259 at *6 (internal quotation marks omitted). "The standard of proof for restriction on removal is more demanding than the well-founded fear standard applicable to an asylum claim. Thus, when an applicant fails to establish the objective component of a well-founded fear of persecution, he necessarily fails to establish entitlement to restriction on removal." *Id.* at *6*7 (internal quotation marks and citations omitted).

B. Facts and Proceedings Below

Mr. Rangel Quinonez contends that he suffered political persecution giving rise to a fear of future persecution in the course of events surrounding an attempted abduction by unidentified anti-government guerillas on March 9, 1999. At the time, he was a personnel manager at his father's car dealership in Bucaramanga, Colombia. He attributes the abduction attempt to his earlier refusal to comply with a demand by a man who visited him at the dealership and "identified himself as a member of a guerilla group." R. at 110. The demand was "to let one of their . . . people come in to work in the enterprise." *Id.* Mr. Rangel Quinonez testified that for about a week after the failed abduction he hid at his father's home in the hills above Bucaramanga, and then went with his wife and daughter to Miami, Florida. He returned to Colombia a week and a half later, thinking that he could live in the country if he had a security service. Threatening follow-up phone calls, however, convinced him

otherwise, and he returned to the United States on June 20, 1999.

Although Mr. Rangel Quinonez testified that the first visitor identified himself as a guerilla, he provided no evidence that the men involved in the abduction attempt were guerillas--other than the assertion that in Colombia "the common criminals [are] always asking to steal money or a car or something," whereas guerillas typically attempt abductions. *Id.* at 114. Further, the only link Mr. Rangel Quinonez made between these two incidents and his political opinions was the assertion that guerillas in Colombia "try to place people in a business to convince the workers to come over to . . . the guerillas' beliefs[,]" *id.* at 11112, and that when he refused the initial demand to hire an operative, he "told [the guerillas] that [his] political views were not in accordance with their political views." *Id.* at 111. The IJ noted, however, that Mr. Rangel Quinonez "testified that he has never belonged to a political party or donated any money to a political organization," and that "it does not appear that his father has been politically active either." *Id.* at 68.

The IJ denied Petitioners' asylum claim because he found that Mr. Rangel Quinonez showed neither a subjective nor an objective fear of persecution in Colombia on the basis of his political opinion. With respect to Mr. Rangel Quinonez's subjective fear, the IJ based his finding on Mr. Rangel-Quinonez's return to Colombia only 10 days after his first entry into the United States, as well as his testified-to knowledge that his parents and brothers were living safely in Colombia.

As for the objective element of the asylum claim, the IJ found that Mr. Rangel Quinonez had not "establish[ed] the nexus between the harm which he suffered and which he fears and any of the protected grounds." *Id.* at 7374. First, the IJ found that Mr. Rangel Quinonez's description of the visit by the guerilla operative did not "show[] that [he] has been targeted for persecution" because "[w]e do not know from [his] version of events who wanted him to hire somebody or why they wanted [him] hired." *Id.* at 74. The IJ also found that Mr. Rangel Quinonez had failed to show that the attempted abduction was made on account of his political beliefs, because he "did not have any expressed political opinion" beyond his testimony in the hearing that he believed in "liberty," which amounted to a "political opinion . . . so vague that . . . [he] did not have a meaningful political opinion which anyone would be interested in changing." *Id.* at 7475. Finally, the IJ found that Mr. Rangel Quinonez's testimony as to the threatening phone calls after the attempted abduction was "less than persuasive," because, again, he did not identify the callers or provide any details about the calls. *Id.* at 74.

With respect to Petitioners' restriction-on-removal claim, the IJ said that "[b]ecause [Mr. Rangel Quinonez] has failed to establish that he meets the definition of refugee, he has failed to satisfy the higher burden of proof for withholding of removal . . . ." *Id.* at 76.

Petitioners challenge the IJ's adverse asylum determination, contending that he erred in finding no "nexus between the harm which [Mr. Rangel Quinonez] suffered and which he fears and any of the protected grounds," Aplt. Br. at 5, because the IJ erroneously found that (1) Mr. Rangel Quinonez did not possess a meaningful political opinion sufficient to attract political persecution; (2) his kidnappers did not have a political motive in attempting to kidnap him; (3) Mr. Rangel Quinonez failed to establish the identity of his would-be kidnappers as guerillas; and (4) "security precautions are sufficient in Bucaramanga, Colombia" to live free of harm . . . ." *Id.* They also assert that the IJ erred in denying their restriction-on-removal claim.

II. DISCUSSION

"Where . . . the BIA summarily affirms or adopts an immigration judge's decision, this court reviews the judge's analysis as if it were the BIA's." *Tsevegmid*, 336 F.3d at 1235. Our standard of review is highly deferential: "We review the IJ's resolution of the initial refugee status question under a substantial evidence standard." *Yuk v. Ashcroft*, 355 F.3d 1222, 1233 (10th Cir. 2004). This means that the IJ's adverse asylum decision "must be upheld if supported by reasonable, substantial and probative evidence on the record as a whole." *Krastev v. INS*, 292 F.3d 1268, 1275 (10th Cir. 2002). We hold that the record supports the IJ's holding that Mr. Rangel Quinonez failed to make the requisite showings to be eligible for asylum or restriction on removal under the INA.

Guerilla targeting of an innocent civilian for non-political reasons does not in itself amount to political persecution for the purposes of an asylum claim. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (fact that "the guerillas seek to fill their ranks in order to carry on their war against the government and pursue their political goals . . . does not render . . . forced recruitment 'persecution on account of . . . political opinion.'" (internal citation omitted)); *Ustyan v. Ashcroft*, No. 02-9596, U.S. App. LEXIS 6814, at *4 (10th Cir., April 8, 2004). Even assuming that the men who visited, attempted to kidnap, and later called Mr. Rangel Quinonez were guerillas, their use of force to place an operative in his employ (or to kidnap him for ransom) does not amount to political persecution if that attempt was made without regard to his political opinions. Although Mr. Rangel Quinonez told the first alleged guerilla that he did not share the guerillas' views, this expression of opinion (probably held by most of his compatriots) was not necessarily the reason for his persecution. *Cf. Elias-Zacarias*, 502 U.S. at 483 ("[Petitioner] appears to argue that not taking sides with any political faction is itself the affirmative expression of a political opinion. That seems to us not ordinarily so . . . ."). After all, Mr. Rangel Quinonez had not distinguished himself from the general populace by participating in any political activity. It was not unreasonable for the IJ to find that the guerillas' interest in him was not his rather vague political views but something else, such as his wealth or his position in the car dealership. Hence, we affirm the IJ's adverse asylum determination on the ground that Petitioners failed to show that any persecution of Mr. Rangel Quinonez was based on his political opinions. It is

therefore irrelevant whether the IJ erred in finding that Mr. Rangel Quinonez had failed to establish that his assailants were in fact anti-government guerillas. Likewise, whether Mr. Rangel Quinonez could live safely in Colombia is irrelevant.

Because we affirm the IJ's holding that Mr. Rangel Quinonez failed to establish the objective component of a well-founded fear of persecution for the purpose of his asylum claim, he necessarily failed to establish his (and his wife's) entitlement to restriction on removal. *See Batalova v. Ashcroft*, 355 F.3d 1246, 1255 (10th Cir. 2004); *Yuk*, 355 F.3d at 1236. Accordingly, we affirm the IJ's restriction-on-removal determination.

III. CONCLUSION

We AFFIRM the decision of the BIA.

ENTERED FOR THE COURT

Harris L Hartz
Circuit Judge

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

[ENTERED: MARCH 6, 2003]

Files: A77 868 231 – Salt Lake City
A77 868 232

Date: MAR 06 2003

In re: SERGIO ALBERTO RANGEL QUINONEZ
ESTHER CRISTINA CAMACHO MEMENDY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Suzanne Brown, Esquire

ON BEHALF OF SERVICE:
Weldon S. Caldbeck,
Assistant District Counsel

ORDER:

PER CURIAM. The Board Affirms, without opinion, the results of the decision below.[1] The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

/s/
FOR THE BOARD

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[1] The respondents' request for three-member review made pursuant to 8 C.F.R. § 3.3(f) is denied.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Salt Lake City, Utah

File No: A 77 868 231/232 August 14, 2000

In the Matter of

SERGIO ALBERTO RANGEL QUINONEZ
and ESTHER CHRISTINA CAMACHO
MIMENDY

Respondents

[ENTERED: AUGUST 14, 2000]

IN REMOVAL PROCEEDINGS

CHARGE: Immigration and Nationality Act Section 237(a)(1)(B)–nonimmigrant overstays.

APPLICATIONS: Asylum under Section 208 of the Immigration and Nationality Act; withholding of removal pursuant to Section 241(b)(3) of the Immigration and Nationality Act; and the Convention Against Torture.

ON BEHALF OF RESPONDENT:

Suzanne Brown, Esquire
Brown and Wichmer
7700 Clayton Road
Suite 306
St. Louis, Missouri 63117

ON BEHALF OF SERVICE:

Weldon Caldbeck, Esquire
Assistant District Counsel
Denver, Colorado

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are married. The first named respondent is a 30-year-old male, native and citizen of Colombia. The second named respondent is 23 years old, she is also a native of Colombia. The respondents arrived in the United States on June 20, 1999. They were admitted as nonimmigrants with authorized stay up until September 19, 1999. Through counsel the respondents have admitted that they remained in the United States beyond their authorized period of time without further authorization from the Immigration and Naturalization Service. Through counsel they have conceded that they are subject to removal as charged and the charges will be sustained.

The respondents request asylum and withholding of removal under the Immigration and Nationality Act and under the Torture Convention. There is a single application which was submitted. The

application was executed by the male respondent. The request for asylum of the second named respondent is based upon the application of the first named respondent. The application was submitted to the Immigration and Naturalization Service on December 5, 1999, and the applications were not granted by the immigration Service but the matter was referred to this Court. A merits hearing was held in this case. The first named respondent was the sole witness in the proceeding. Because he was the sole witness and because it was his application which was submitted, hereafter he will be referred to as "the respondent". The respondent also submitted a great deal of background material concerning the situation in Colombia, as well as information relating specifically to the respondent. Also the respondent submitted a letter which counsel claims was authored by one of the guerrilla groups in Colombia (Exhibit 4). The letter was offered without a translation as required by the regulations, however, the Court permitted the court interpreter to translate the letter orally. The letter is unsigned and it appears to be a fax copy originating from another fax copy. The document has not been properly authenticated and so its probative value is difficult for this Court to assess. However, the document was allowed into the record.

The respondent presented his passport to the Court. It does show that both respondents have made numerous trips to the United States. The passport of the first named respondent indicates arrivals in the United States, March 14, 1998, March 29, 1999, and June 20, 1999. The passport of the second named respondent shows those same three entries and also another entry on January 7, 1999.

The respondents were married in 1995. They have one child, which was born in the United States on a previous visit to this country. The adult male respondent testified that he worked in Colombia for the family's automobile dealership. He was a manager of the dealership in Bucaramanga in Santander province in Colombia. The respondent testified that there are various guerrilla groups active in his area in Colombia and he characterized them as being "leftist" and they aimed to take over the country. The respondent testified that he has a contrary political opinion, that is, he believes in "freedom". The respondent testified that he has never belonged to a political party or donated any money to a political organization and it does not appear that his father has been politically active either. The respondent testified that in January of 1999 he was at his dealership when a person who identified himself as "a member of a guerrilla group" demanded that the respondent hire a member of their group. The person did not say what group he belonged to or who the person was to be hired. The respondent assumed that this person was from a guerrilla group because he believes that this is the way the guerrilla groups operate. The respondent was asked by his counsel if it is common for the

guerrillas to place workers in an organization in order to convince the workers to join that organization and the respondent relied, "Yes". The respondent testified that he did not agree to hire anybody referred by this unnamed group. The respondent testified that afterwards he started receiving threatening phone calls. The respondent did report the threatening phone calls to the police. They responded and counseled the respondent on how to comport himself under the situation.

On March 19, 1999, according to the respondent, two armed men came to his business and said that they were from the police and that they were investigating a stolen car. The record will show that the respondent provided some newspaper articles to document this event. The respondent also provided a letter from, the National Police indicating that there is an investigation concerning the episode. The letter from the police, however, indicates that the episode took place on April 19, 1999, whereas the respondent indicated that the episode took place on March 19, 1999. The respondent testified that six men were involved in the attempted abduction. He explained that two men initially came in, said that they were from the police investigating a stolen car. The respondent believes that these people were from the same group that initially required him to hire someone from the group, however, again the group did not identify itself. The respondent presumed that they were from the same group and that they were some form of guerrilla group. The respondent believes that the assailants were guerrillas rather than common criminals because of the weapons that they had. The respondent explained that they had 9 mm. pistols and

they apparently had a hand grenade. It does not seem to the Court that this type of weaponry is restricted to military or guerrilla organizations. In fact, the respondent explained that occasionally the guerrillas hire common criminals who apparently are armed in this fashion to commit abductions. The respondent testified that the abductors tied up some employees and tried to force the respondent into a pickup truck. The respondent resisted. He was hit and his shirt was torn. He was slightly injured, however, it was not such an injury that required him to see a doctor. The respondent was able to break free and the assailants fled. One of the newspaper articles describing the attempted abduction describes the situation as follows: "The criminals demanded that the businessman enter a vehicle but he was able to trick the anti-socials and escaped. Advised of this action, the police took control of the situation implementing the operation lock and the frustrated kidnappers ran away." (Exhibit 4-13). The respondent was asked again as to why he believes that the assailants were guerrillas since they did not identify themselves as guerrillas. The respondent explained that the guerrillas "take people" and that the criminals "just steal things". The Court finds that the respondent's explanation as to why he believes the assailants were guerrillas is speculation. It is clear from the background material that there are common criminals in Colombia who engage in abductions in order to extort a ransom from relatives and co-workers. It seems to this Court that there is not evidence on this record from which this Court could find that the respondent was approached by guerrillas as opposed to having been approached by common criminals.

The respondent testified that after the attempted abduction in March of 1999 that he fled to his father's home in the hills-This is a place where there are many political figures living and the respondent indicated that with the help of the police and army in Colombia, as well as hired help, that the people living in this area are able to live securely. The respondent stayed about ten days in his father's home in the hills and then he came to Miami. He stayed about another ten days in the United States and then he returned to Colombia. The respondent claims that he returned to Colombia because he believes that the situation in Colombia had settled down and that it was safer for him to come back after those ten days. The Court finds this to be somewhat improbable. It is very unlikely that if the respondent was afraid of the guerrilla wars in Colombia that he would have sincerely believed that the situation would have significantly changed during the ten days that he was in the United States. Rather, what the respondents' return to Colombia after ten days in the United States shows is that the respondent most likely did not have a subjective fear of persecution in Colombia based on any organized activity by the guerrillas. The respondent testified that his brother remains in Colombia and runs the car dealership. It does not appear that he has had any contact with any organized crime figures or with the guerrillas since the respondent left. The respondent acknowledged that his parents and his brothers are living safely in Colombia with the help of hired bodyguards and with the help of the government. The respondent attempts to distinguish his situation indicating that it would be different because of the past kidnapping attempt. The Court does not find that this

attempt to distinguish the respondent's situation from his parents and his brothers is convincing. Rather, the respondent would most likely find himself in a situation very similar to his parents and his brothers if he returned to Colombia and that is, that he would be able to live there provided he took prudent and substantial efforts to protect himself.

The respondent bears the burden of proof in applications for asylum. In order to be granted asylum the respondent must show that he meets the definition of refugee as set forth in Section 101(a)(42) of the Immigration and Nationality Act, that is, he must show than he has suffered persecution in the past or that he has a reasonable fear of persecution in the future on account of race, religion, nationality, membership in a particular group, or political opinion. The respondent meets this burden of proof if he shows that a reasonable person in his position would fear persecution in his home country. The respondent's claim may be proven by his own testimony, although corroborating evidence should be provided where it is available. In order to be granted withholding of removal under the Immigration and Nationality Act or under the Torture Convention, the respondent bears a heavier burden of proof in the sense that he must show that it is "more likely than not" that he would be persecuted or tortured.

In assessing the respondents' claim, I believe that the respondent has testified in a generally credible fashion in the sense that I believe that the respondent has testified basically to the facts that he believes are true. I do think that the respondent may have

embellished some of the details, however, counsel for the respondent, as well as counsel for the Immigration Service, have indicated that they feel that this record shows that the respondent did suffer what appears to be an attempted kidnapping on March 19, 1999. This would, of course, instill subjective fear in the victim. The problem with the asylum claim as far as the Court can see, is that the respondent has not been able to establish the nexus between the harm which he suffered and which he fears and any of the protected grounds. The respondent testified that he was approached by a person who wanted him to hire someone into his organization. The identity of the person was not disclosed, the organization that the person belonged to was not disclosed, the identity of the person to be hired was not disclosed. The respondent himself acknowledged that when this episode occurred he did not take it very seriously. This is a very curious episode and I do not think it shows that the respondent has been targeted for persecution. We do not know from the respondent's version of events who wanted him to hire somebody or why they wanted this person hired. The respondent did testify that later on there were some telephone calls. Again, it does not appear that the identity of the people making the telephone calls was disclosed. This aspect of the respondent's testimony, that is, the aspect regarding telephone calls, the Court finds to be less than persuasive. The respondent did not provide any detail about those telephone calls. In any event, the respondent indicates that he did report the telephone calls to the police and they were attempting to identify the callers, showing that the government in Colombia is willing to protect the respondent.

The attempted kidnapping on March 19, 1999, again is described in such a way that the assailants are not identified. The respondent did not have any expressed political opinion, he indicated that he does believe in "liberty" but his political opinion is so vague that the Court believes that the respondent did not have a meaningful political opinion which anyone would be interested in changing. The unknown assailants, therefore, could not have been motivated by a desire to change the respondent's political opinion and there is nothing on this record to indicate that they were motivated by any of the other protected grounds. The record does not clearly indicate that the episode of March 19, 1999 was a kidnapping for ransom, however, it is the respondent's burden of proof in applications for asylum and for withholding of removal. The record does not indicate any particular reason for the kidnapping attempt and so the Court finds that the respondent has failed to meet his burden of proof to show that there was a connection between the attempted abduction and any of the protected grounds.

The record in this case also indicates that the government of Colombia certainly is willing to protect the respondent to the extent they can. It is clear that a great deal of enforcement resources were brought to bear on the respondent's complaints. Of course no police force in any country is able to provide 100% protection for its citizens but it does seem in this case that the government of Colombia is willing to provide its protection and the record in this case also shows that the protection provided by the government, together with the private protection which can be afforded by relatively affluent business persons such as

the respondent, does provide the inhabitants with a degree of protection. And so, on this record, I cannot find that the respondent has shown that, the government of Colombia, together with the respondent's own resources, is insufficient to protect the respondent. Indeed, it appears that the respondent's brother, who now occupies virtually the same position that the respondent had in Colombia, is able to live in Colombia without being kidnapped.

Accordingly, the Court finds that the respondent has failed to establish that he meets the definition of refugee as set forth in Section 101 (a)(43)(A) of the Immigration and Nationality Act. The Court also believes that the respondent has failed to meet the higher burden of proof to shoe that it is more likely than not that he would be persecuted or tortured in Colombia if he were to return there. The respondent did in fact return to Colombia after the abduction in March of 1995 and it does not appear that he suffered upon his most recent trip to Colombia. Because the respondent has failed to establish that he meets the definition of refugee, he has failed to satisfy the higher burden of proof for withholding of removal under the Immigration and Nationality -Act. Likewise, I do not believe that this record shows that it is more likely than not that the respondent would be tortured if he were to be returned to Colombia. The record is consistent with a theory that the respondent fears common criminals in Colombia and with the protection of the authorities there, it can not be said it is more likely than not that he would be tortured it he were returned to Colombia. Accordingly, I find that the respondent has failed to meet his burden of proof with respect not only to

asylum, but to withholding of removal under the Immigration and Nationality Act and the Torture Convention. And so, those forms of relief must be denied. Accordingly, the following order shall issue:

ORDER

The applications of the respondents for asylum in the United States are denied;

The applications of the respondents for withholding of removal under Section 241(b)(3) and the Convention Against Torture are denied; and the following order shall issue:

The respondents are ordered removed from the United States to Colombia pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act.

/s/ Donn L. Livingston
DONN L. LIVINGSTON
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE DONN L. LIVINGSTON, in the matter of:

SERGIO ALBERTO RANGEL QUINONEZ and
ESTHER CHRISTINA CAMACHO MIMENDY
A 77 868 231/232
Salt Lake City, Utah

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Michelle P. Marvin
Michelle P. Marvin, Transcriber

Free State Reporting, Inc.
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October 26, 2000
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

Sec. 1101. - Definitions

(a) As used in this chapter -

* * *

(42) The term "refugee" means

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited,

assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * *

Sec. 1158. - Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in

international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

* * *

Sec. 1231. - Detention and removal of aliens ordered removed

* * *

(b) Countries to which aliens may be removed

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

* * *